No. 84-1560

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

THE PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,

VS.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,
Respondent.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER FILED ON BEHALF OF THE DISTRICT ATTORNEY, COUNTY OF RIVERSIDE

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus respectfully submits this Brief of Amicus Curiae in support of the Brief from the petitioner on the merits. Amicus is the People of the State of California in the person of Grover C. Trask II, District Attorney for the County of Riverside, State of California. The People of the State of California are the party plaintiff in all criminal actions prosecuted in California courts. Amicus filed a criminal action against the defendant Robert Rubane Diaz on December 23, 1981, alleging twelve counts of murder in violation of Section 187 of the Penal Code. The matter subsequently was heard before a magistrate at the preliminary examination commencing on July 6, 1982, ending on August 3[illegible], 1982, and consuming forty-one days of court time and public resources. At the end of

the hearing, the transcripts were ordered sealed until further notice. On January 21, 1983, Amicus moved to have the transcripts of the preliminary examination released to the public in the Superior Court. The motion was denied and on March 11, 1983, Amicus filed a Petition for Writ of Mandate before the California Court of Appeal, Fourth District, Division Two, stating that the trial court abused its discretion in sealing the court records prior to trial in the case of *The People of the State of California* v. *Robert Rubane Diaz*. The Petition for Writ of Mandate was summarily denied on February 21, 1984. The Press-Enterprise Company filed a petition for hearing in the California Supreme Court. Petition for hearing was granted and the matter set for hearing. The People of the State of California, in the person of Grover C. Trask II, District Attorney for the County of Riverside, State of California, filed a Brief of Amicus Curiae in support of the petition. On December 31, 1984, the California Supreme Court rendered its decision determining that the First Amendment of the United States Constitution does not provide a right of access to preliminary examinations. It further determined that the statutory right of access under Penal Code Section 868 could be denied upon a showing of "reasonable likelihood of substantial prejudice" to the defendant's right to a fair trial.

It is of vital importance to the Amicus that the right of each party to fair criminal proceedings is protected without infringing on the constitutionally protected rights of the press, the public in general or individual persons. The issues presented in this case involve a balancing of the public's right of access to criminal proceedings and the right of the criminal defendant to be free from prejudicial pretrial publicity that may affect the criminal defendant's right to a fair and impartial trial.

It is for these reasons that the Amicus has a stated interest.

SUMMARY OF ARGUMENT

This Court has found that the press and the public have a *qualified* First Amendment right to attend a criminal proceeding. (*Press-Enterprise Company* v. *Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980).)

This right, however, must be weighed against other interests such as the right of both the defendant and the People to a fair trial.

The preliminary examination is a critical stage of the criminal process, including many of the same evidentiary and procedural requirements as a trial or a pretrial suppression hearing. For these reasons there must be a *qualified* constitutional right to open preliminary examinations.

A magistrate's decision to restrict public access must be articulated in findings which acknowledge the interests involved, and the closure should take into consideration alternative solutions which limit the effect on the public's right of access to criminal trials.

In this case, the magistrate's order closing the preliminary examination in its entirety, and the trial court's order sealing the preliminary examination transcript were overbroad. The magistrate and trial judge made no articulated findings which would justify constitutionally denying public access to the hearing or all of the transcript. Both orders were based upon an unfettered and arbitrary

discretion on the part of the judicial officer, because of the lack of any constitutional guidelines or rules.

Finally, assuming a constitutional right of access exists, allowing a preliminary examination to be closed upon a mere showing of "reasonable likelihood of substantial prejudice", as directed by the California Supreme Court, permits closures that do not follow the rules set out in *Press-Enterprise*:

> "The presumption of openness may be overcome only by an overriding interest based upon *findings* that the closure is essential to preserve higher values and is narrowly tailored to serve that interest. *The interest to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.*" (464 U.S. 501, 104 S.Ct. at p. 824.) (Emphasis added.)

It is for these reasons that this Court should find a qualified First Amendment right of public access to preliminary examinations.

I.

THE PUBLIC'S RIGHT OF ACCESS GUARANTEED BY THE FIRST AMENDMENT EXTENDS TO CRIMINAL PROCEEDINGS INCLUDING CALIFORNIA'S PRELIMINARY EXAMINATIONS

A. The preliminary examination is a "critical stage" of the criminal process where a significant number of criminal cases will be finally decided.

The California Supreme Court in *Press-Enterprise Company* v. *Superior Court (Diaz)*, 37 Cal.3d 772, 775-777, 681

P.2d 1026, 209 Cal.Rptr. 360 (1984)[1] has found no constitutional right to public access at preliminary hearings. In reaching this conclusion, the California Supreme Court considered and rejected the importance of the public's right of access to criminal proceedings, articulated in *Richmond Newspapers* v. *Virginia*, 448 U.S. 555 (1980), *Globe Newspaper* v. *Superior Court*, 457 U.S. 596 (1982), and *Press-Enterprise Company* v. *Superior Court*, 464 U.S. 501 (1984). These are cases where this Court found the press and the public to have a qualified First Amendment right to attend the criminal process. In each case, the Court looked to history and policy to conclude that the public has a First Amendment-based right of access to criminal proceedings.[2]

The California Supreme Court has stated that the preliminary examination is a "critical stage" of the criminal process. (*Hawkins* v. *Superior Court*, 22 Cal.3d 584, 588, 150 Cal.Rptr. 435, 586 P.2d 916 (1978); *San Jose Mercury-News* v. *Municipal Court*, 30 Cal.3d 498, 638 P.2d 655, 179 Cal.Rptr. 772 (1982).) While *Hawkins* gives every felon an absolute right to a preliminary hearing, the California Supreme Court failed to articulate a corresponding right of access by the public.

The California preliminary examination is the type of criminal proceeding that takes on many of the aspects of a public trial that gave way to the public's right to access noted in *Richmond Newspapers*, *Globe Newspaper*, and *Press-Enterprise*. The very nature of a preliminary exami-

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[1] Hereinafter referred to as *Diaz*.

[2] See also *Waller* v. *Georgia*, 467 U.S. 39, 104 S.Ct. 2210 (1984), in which this Court held that closure of a pretrial suppression hearing over the defendant's objection violated the Sixth Amendment guarantees for public trials.

nation warrants a *qualified* constitutional right of public access. In a high percentage of criminal cases, the proceedings surrounding such examination will constitute the only "trial" of the issues in the case. (See, e.g., *San Jose Mercury-News* v. *Municipal Court,* 30 Cal.3d 498, 511, 638 P.2d 655, 179 Cal.Rptr. 772 (1982), citing California Department of Justice *Crime and Delinquency in California,* Part II, 10.[3])

Looking at the California preliminary hearing itself, this Court will find an impressive array of procedural and substantive rights that take on the aura of a "mini-trial":[4]

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[3]For example, the 1984 Riverside County District Attorney's Annual Report reflects 1006 defendants pled guilty before the magistrate prior to the preliminary examination (California Penal Code Section 859a). Over 554 defendants requested their right to a preliminary examination and ultimately pled guilty in Superior Court. One hundred thirty-five defendants chose jury trials while 14 defendants went to court trials. Thus to 1560 felons, the preliminary hearing stage by plea or hearing became the most important aspect in the procedural and substantive forest before sentencing in Superior Court. Only 149 felons or 12% received public trials. Thus the public's only right to access to 88% of the cases occurred either at the preliminary hearing stage or pretrial and sentencing hearings in Superior Court. According to the Department of Justice, Bureau of Criminal Statistics, this appears to be the statewide trend throughout California for adult felony arrest dispositions for 1984. (See Exhibit A.)

In *Waller* v. *Georgia,* this Court noted: "In *Gannett* as in many cases, the suppression hearing was the *only* trial, because the defendants thereafter pled guilty pursuant to a plea bargain" (467 U.S. ——, 104 S.Ct. at 2216).

[4]*Mercury News* v. *Municipal Court,* 30 Cal.3d 498, 510:

> "Preliminary hearings are a critical step in the accusatory process. Though they do not resemble the trial in all particulars, ... there are many similarities. Witnesses may be cross-examined, credibility is crucial, and each side has an incentive to prevail. The hearing may reveal weaknesses in prosecution or defense evidence that forecast the ultimate disposition. [Par.] Further, when exclusion of evidence is not at issue the preliminary hearing may turn out to be 'the only judicial proceeding of substantial importance that takes place during a criminal prosecution....' It has been reported that in 1978 only 3.2 percent of all felony-arrest dispositions in this state involved trials.... [Par.] The preliminary hearing often provides a forum for adjudication of issues involving police misconduct and exclusion of evidence. In many cases it may provide the sole occasion for public observation of the criminal justice system...."

However, sanity and competency issues cannot be litigated at the preliminary examination stage. See California Penal Code Sections 1026 and 1368.

[5]In *Waller* v. *Georgia,* 467 U.S. 39, 104 S.Ct. 2210 (1984), while discussing the First Amendment issues concerning the importance of public scrutiny of governmental acts, this Court stated:

> "The need for an open proceeding may be particularly strong with respect to suppression hearings ... any closure of a sup-

1. Advisement of the defendant: legal and constitutional rights, including the right to a court appointed attorney. (Penal Code Sections 859, 866.5.)

2. Confrontations and cross-examination of witnesses against the accused (Penal Code Section 865).

3. Exclusion of witnesses (Penal Code Section 867).

4. Defense testimony of any kind (Penal Code Section 866).

5. Continuances (Penal Code Section 861).

6. All of the constitutional exclusionary rules are available to the defendant (Penal Code Section 1538.5 et seq.).[5]

7. Challenges to the identity of a confidential informant (California Evidence Code Section 1042).

8. Challenges to eyewitness information and the admissibility of admissions or confessions can be made (*People* v. *Malich*, 15 Cal.App.3d 253, 93 Cal.Rptr. 87 (1971)).

9. The magistrate may determine the credibility of witnesses and make factual findings that cannot be changed by a higher court (*DeMond* v. *Superior Court*, 57 Cal.2d 340, 19 Cal.Rptr. 313, 368 P.2d 865 (1962)).

10. The magistrate has the power on its own motion to dismiss the action in the furtherance of justice, or reduce the charges (Penal Code Sections 1385, 17(b)(5)).

11. A holding by the magistrate that there "is sufficient cause to believe the defendant guilty thereof" (Penal Code Section 872).

These procedural and substantive rights illustrate clearly that the problem of potential prejudice to the defendant is not substantially different in the context of preliminary examinations than it is in the context of public trials.

B. The social benefits derived from open trials and other criminal proceedings are compelling at the preliminary hearing stage.

This Court has identified four benefits from public access to criminal proceedings: (1) Improved quality of the proceedings; (2) Increased public understanding of the criminal justice system; (3) Public confidence in the

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pression hearing over objections of the accused must meet the tests set out in *Press-Enterprise* and its predecessors."

system; and (4) "Community therapeutic value", associated with the view that the criminal justice system is functioning and the law is being enforced. (*Press-Enterprise Company* v. *Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 823-824, 78 L.Ed.2d 637-638 (1984). See also *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 604-606, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Nebraska Press Association* v. *Stuart*, 427 U.S. 531, 559-561, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *Press-Enterprise Company* v. *Superior Court (Diaz)*, 37 Cal.3d at 779-780; and *San Jose Mercury-News* v. *Municipal Court*, 30 Cal.3d 498.[6])

Each of these benefits should apply with full force to public access to preliminary examinations.[7] These societal interests, served by public access, are drastically compromised whenever public attendance is curtailed during preliminary examinations. Public understanding, confidence and therapy obviously are not increased if its members are excluded from the only evidentiary hearing conducted in the vast majority of felony cases.

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[6]A preliminary hearing that is guaranteed to be open will help to "vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct. . . ." (*Press-Enterprise Company* v. *Superior Court*, 464 U.S. 501, 104 S.Ct. at 823-824, 78 L.Ed.2d at 637 (1984).)

[7]Recently, in *Tribune Newspapers West, Inc.* v. *Superior Court*, 172 Cal.App.3d 443, 218 Cal.Rptr. 505 (1985), a California Court of Appeal recognized a qualified right of public access to juvenile court proceedings.

II.

ALLOWING A PRELIMINARY EXAMINATION TO BE CLOSED UPON A MERE SHOWING OF "REASONABLE LIKELIHOOD OF SUBSTANTIAL PREJUDICE", UNCONSTITUTIONALLY PERMITS CLOSURES IN WHICH THE VALUE OF OPENNESS IS NOT OUTWEIGHED BY OR ESSENTIAL TO THE SIXTH AMENDMENT RIGHT OF FAIR TRIAL

A. The Diaz case does not require a specific finding of an overriding Sixth Amendment interest to justify closure of a preliminary examination.

The California Supreme Court in *Diaz* held, pursuant to the California Penal Code Section 868,[8] that the defendant who has established a "reasonable likelihood of substantial prejudice" after all the evidence is considered may not be compelled to risk his fair trial right by an open hearing. Assuming the constitutional right of access extends to preliminary examinations, the ambiguous standard set by the California Supreme Court is in conflict with this Court's rulings on appropriateness of closures insofar as it fails to require an articulated weighing of interests and findings by the magistrate.

[8]Penal Code Section 868 states, in part,

> "The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is *necessary in order to protect the defendant's right to a fair and impartial trial*, the magistrate shall exclude from the examination every person except the clerk, court reporter and bailiff, the prosecutor and his or her counsel, the Attorney General, the district attorney of the county, the investigating officer, the officer having custody of a prisoner witness while the prisoner is testifying, the defendant and his or her counsel, the officer having the defendant in custody and a person chosen by the prosecuting witness who is not himself or herself a witness but who is present to provide the prosecuting witness moral support, provided that the person so chosen shall not discuss prior to or during the preliminary examination the testimony of the prosecuting witness with any person, other than the prosecuting witness, who is a witness in the examination." (Emphasis added.)

In reaching this conclusion the *Diaz* case fails to address the rigorous requirement of articulated findings imposed by this Court to support a closure decision. (See, e.g., *Waller* v. *Georgia,* 476 U.S. 39, 104 S.Ct. 2210 (1984); *Press-Enterprise Company* v. *Superior Court,* 464 U.S. 501, 104 S.Ct. 824, 825, 78 L.Ed.2d 639 (1984); *Application of the Herald Co.,* 734 F.2d 93, 100, 101 (2d Cir. 1984); *Associated Press* v. *United States District Court for Central District of California,* 705 F.2d 1143, 1146 (9th Cir. 1983); *United States* v. *Chagra,* 701 F.2d 354, 361, 365 (5th Cir. 1983); *United States* v. *Brooklier,* 685 F.2d 1162, 1169 (9th Cir. 1982); *United States* v. *Criden,* 675 F.2d 550, 560-561 (3d Cir. 1982).)

An absence of guidance in this area has left courts to fashion their own tests for striking "the balance of interest" between a fair trial or preliminary examination and a free press. *Diaz* is an example of the need for this Court to set the necessary guidelines and rules to be used by all courts, thus eliminating the conflict and confusion that presently exists.[9]

[9]Even in California, courts have conflicting standards when closing the preliminary hearing. In *Eversole* v. *Superior Court,* 148 Cal.App.3d 188, 195 Cal.Rptr. 816 (1983), a defendant charged with rape and other offenses petitioned the Court of Appeal for an extraordinary writ after the magistrate ordered the preliminary hearing closed during the testimony of the minor victim on motion of the People pursuant to California Penal Code Section 868.7. The Court of Appeal issued a writ commanding the trial court to take no further action in the case other than to dismiss. The Court held that, before ordering a preliminary hearing examination closed during

The facts in *Diaz* provide little guidance for trial courts in closing preliminary hearings. The exhibits introduced by the Diaz defense demonstrate extensive media coverage during the investigation before the preliminary hearing was held. Defense counsel cited two newspaper articles dealing with the circumstances surrounding the hospital deaths. The articles did not contain any gory or gruesome details of the crime or admissions of guilt by the defendant. Some of the articles dealt with collateral events, lawsuits filed by the defendant and interviews with medical personnel associated with the hospital. Defense counsel cited nineteen articles between November 23, 1981 and September 1, 1982; however, eight of the articles dealt with the affairs of the Public Defender's Office and, specifically, they concerned the public defenders assigned to represent the defendant, not accounts of the actual case. After September 1, 1982, four articles were submitted to the court's consideration. None of these articles were so hostile, sensational or inflammatory so as to reasonably support an inference of substantial prejudice. The magistrate made no specific findings regarding the prejudicial nature of this publicity. Consequently, the preliminary examination was closed on *mere speculation.*

While the manner and style of media coverage may be one factor relevant to the issue of access,[10] (e.g., *Chandler*

testimony of a minor victim, the magistrate must first specify findings that testifying before the general public would threaten the minor with serious psychological harm and that no alternative means are available to avoid the perceived harm. The magistrate apparently erred in not making findings to support the closure.

[10]There are instances where the news media themselves may contribute substantially to a climate of partiality, either through the manner of reporting, the characterization of the accused, the interviewing of witnesses or others. (See, e.g., *Sheppard* v. *Maxwell,* 384

v. *Florida,* 449 U.S. 560 (1981), it would appear the record reflects that the media acted with concern and responsibility in covering the murder of twelve hospital patients in this case.

B. The Diaz case does not set forth a clear evidentiary burden to justify closure of a preliminary examination.

Whether the proponent of the closure is for the benefit of the accused's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information, the "balance of interests must be struck with special care". (*Waller* v. *Georgia, supra,* 104 S.Ct. at 2215.)[11]

U.S. 333, 865 S.Ct. 1507 (1966); *Irvin* v. *Dowd,* 366 U.S. 717 (1961); *People* v. *Gomez,* 41 Cal.2d 150, 258 P.2d 825 (1953).)

[11]California Penal Code Section 868.7 allows a magistrate to close a preliminary hearing upon motion of the prosecutor in certain narrowly defined cases:

> "(a) Notwithstanding any other provision of law, the magistrate may, upon motion of the prosecutor, close the examination in the manner described in Section 868 during the testimony of a witness:
>
> "1) Who is the complaining victim of child abuse as defined in Section 11165, or a sex offense, where testimony before the general public would be likely to cause serious psychological harm to the witness and where no alternative procedures, including, but not limited to, video taped deposition or contemporaneous examination in another place communicated to the courtroom by means of closed-circuit television, are available to avoid the perceived harm.
>
> "(2) Whose life would be subject to a substantial risk in appearing before the general public, and where no alternative security measures, including, but not limited to, efforts to conceal his or her features or physical description, searches of members of the public attending the examination, or the tempo-

The evidence produced at the preliminary examination in the case below was a factual account of the circumstances surrounding the deaths of the twelve victims charged in the Information. Most of the testimony and the evidence was scientific in nature. The remainder of the evidence consisted of personal observations of medical personnel who worked with the defendant on particular shifts when the patient-victims died. None of the evidence or testimony was of a nature as to be particularly inflammatory or sensational to lend itself a massive deluge of media coverage wherein there would be a substantial or even a reasonable likelihood of prejudice to the defendant.

Further, the preliminary hearing record does not contain potentially inadmissible evidence which could be disseminated to the public or potential jurors before trial. A motion to suppress evidence was filed by the defense counsel to suppress evidence seized at the defendant's home before his arrest. The motion was taken off calendar because the People stipulated that the seized evidence would not be introduced at the preliminary hearing.

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rary exclusion of other actual or potential witnesses, would be adequate to minimize the perceived threat.

"(b) In any case where public access to the courtroom is restricted during the examination of a witness pursuant to this section, a transcript of the testimony of that witness shall be made available to the public as soon as is practicable."

The legislative intent was to set up strict guidelines for the court in balancing the public interest in open proceedings and the personal safety and well-being of witnesses. The section further places on the magistrate the additional obligation to seek out viable alternatives to closure. The burden on the prosecutor is clear and the necessary showing is well defined and specific. The same caliber of guidelines are necessary for the equitable and practical application of Section 868.

Additionally, no confessions made by the defendant were introduced at the preliminary hearing. The preliminary hearing record contains factual, competent evidence.

The *Diaz* case, gives no guidance for either the proponent or opponent of a closure motion in meeting the "requirements" under Penal Code Section 868. When is there a "clear and present danger of prejudice"? The California Supreme Court states "once a defendant establishes a reasonable likelihood of substantial prejudice, there is clear and present danger of prejudice and the prosecution or media may overcome the defendant's showing by a preponderance of the evidence to the effect that there is no reasonable likelihood of prejudice." (*Press-Enterprise Company (Diaz)* v. *Superior Court,* 37 Cal.3d at 782.) However, for the proponent requesting closure, there is no practical evidentiary burden to meet other than to satisfy the unfettered discretion of the magistrate or trial judge that there is a "reasonable likelihood of substantial prejudice". The *Diaz* case imposes no effective standards by which that discretion is to be exercised. How can the trial level proponents or opponents meet their burden? As pointed out by Justice Lucas, in his concurring and dissenting opinion, the *Diaz* case bleeds out the only specific meaning in the word *"necessary"* from Penal Code Section 868.[12] Since the California

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[12]"In the present case, on denying petitioner's motion to inspect the preliminary hearing transcripts, the trial court found merely that there was a "reasonable likelihood" of prejudice to the defendant, a standard which the majority now embraces. Yet a showing of "reasonable likelihood" of prejudice is not equivalent to a showing of necessity. In my view, the majority's new standard improperly ignores the statutory language.

"As the majority concedes, 'The legislative history . . . as well as its use of the word "necessary," makes clear that the Legislature was of the view that open preliminary hearings would be the rule rather than

Supreme Court requires no specific findings, its test of "reasonable likelihood of substantial prejudice" becomes ambiguous and unclear in application.

C. The Diaz case does not require the magistrate to consider alternatives to closure or to consider whether closure will be effective in the particular case.

This Court has repeatedly stressed that less drastic alternatives to complete closure should be considered prior to a decision to deny public access to judicial proceedings.

In *Waller* v. *Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 2216-2217 (1984), in which a seven-day suppression hearing was apparently closed based on governmental interests associated with two-and-one-half hours of tape recorded conversations, this Court stated:

> "[T]he State's proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes. As a result, the trial court's findings were broad and general, and did not purport to justify closure of the entire hearing. The court did not consider alternatives to immediate closure of the entire hearing: directing the government to provide more detail about its need for closure, *in camera* if

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the exception. "Necessary" is often used in the sense of essential. . . .' (*Ante*, p. ——.) Although a showing of actual prejudice may be difficult to marshall in advance of trial, certainly the defendant should be required at least to demonstrate a substantial probability of prejudice. (See *United States* v. *Brooklier* (9th Cir. 1982) 685 F.2d 1162, 1167.) No such showing was made here." (37 Cal.3d at 782-783.)

> necessary, and closing only those parts of the hearing that jeopardized the interests advanced. As it turned out, of course, the closure was far more extensive than necessary." (104 S.Ct. at 2216-2217 [footnotes omitted].)

In *Press-Enterprise Company* v. *Superior Court*, 464 U.S. 501, 104 S.Ct. 819, 824-826 (1984), in which six weeks of jury selection proceedings were closed and the transcripts sealed, the trial court was criticized for its failure to consider alternatives.

In *Gannett* v. *DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608, Justice Blackman (concurring and dissenting opinion) noted:

> "If, after considering the essential factors, the trial court determines that the accused has carried his burden of establishing that closure is necessary, the Sixth Amendment is no barrier to reasonable restrictions on public access designed to meet that need. Any restrictions imposed, however, should extend no further than the circumstances reasonably require. Thus, it might well be possible to exclude the public from only those portions of the proceedings at which the prejudicial information would be disclosed, while admitting to other portions where the information the accused seeks to suppress would not be revealed. *United States* v. *Cianfrani*, 573 F.2d, at 854. Further, closure should be temporary in that the court should ensure that an accurate record is made of those proceedings held *in camera* and that the public is permitted proper access to the record as soon as the threat to the defendant's fair-trial right has passed." (443 U.S. at 444-445.)

The trial court below and subsequently the California Supreme Court failed to consider these judicially sanc-

tioned alternatives relative to the length and extent of closure.

CONCLUSION

The news media is playing an ever increasing role in the day-to-day functions of the criminal justice system. The reason is obvious. In today's complex justice system, there is a need to communicate to the public what the government and the courts are doing in carrying out their respective responsibilities.

The prosecutor's responsibility to the administration of justice requires that he do nothing which will impair the right of the accused to a fair and impartial treatment in every case. As the representative of public interest, he should be open and candid with the media, always keeping in mind that his interest is to see that justice is done. In this respect, all prosecutors are faced with a very difficult task in attempting to balance both the rights of the individual accused of a crime and the right of the public to know in criminal cases.

In order to carry out our responsibility and at the same time attempt to keep a balance between the First and Sixth Amendments, there is a need to establish identifiable constitutional guidelines at the critical preliminary examination stage in a criminal case.

Certainly the First Amendment right of public access to judicial proceedings is a qualified one, which may give way in individual cases to overriding Sixth Amendment interests in which an open preliminary examination is outweighed by the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information. Nonetheless, a *qualified constitutional right* to an open hearing must exist, even if the balance of

interest of a particular proponent may ultimately override the public's right of access. In this context, the California Supreme Court unconstitutionally permits:

1. Closures in which the value of openness is not outweighed by a showing of potential prejudice;

2. Closures which are not essential to preserving Sixth Amendment interests or governmental interests; and

3. Closures which are not narrowly tailored to serve the interests of public understanding, tolerance, confidence or therapy.

The holding in *Diaz* demonstrates that closure can occur upon the mere showing of "possible prejudice", in the absence of any qualitative findings made by a judicial officer. This is a far cry from the view that open preliminary examinations should be the rule rather than the exception under California Penal Code Section 868.

Amicus urges this Court to establish specific guidelines and rules based upon the First Amendment to protect the public's right of access in California at the critical preliminary examination stage of the criminal process. Even if this Court were to adopt the stricter standard stated by the dissent in the *Diaz* case of a "substantial probability of prejudice", the record must ultimately specify articulate findings that can be reviewed by the appellate courts on a case-by-case basis. This is not the case today in California.

Respectfully submitted,

GROVER C. TRASK II
District Attorney
County of Riverside

ADULT FELONY ARREST DISPOSITIONS IN CALIFORNIA, 1984

TABLE 1
DISPOSITIONS OF ADULT FELONY ARRESTS, 1978–1984
Type of Disposition by Number and Percent Distribution

Type of disposition	Year 1978		1979		1980		1981		1982		1983		1984	
	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent	Number	Percent
Disposition of felony arrests	160,004	100.0	170,880	100.0	180,203	100.0	200,168	100.0	203,806	100.0	201,158	100.0	210,388	100.0
Law enforcement releases	14,606	8.7	18,328	10.7	20,057	10.8	21,122	10.3	20,886	10.3	18,006	8.4	20,180	9.8
Complaints denied	20,888	14.0	23,332	13.8	27,026	14.8	31,312	15.3	37,010	18.2	37,216	18.5	35,488	16.9
Complaints filed	114,410	78.3	129,322	75.8	141,321	74.7	152,734	74.4	145,900	71.8	144,937	72.1	154,720	73.5
Misdemeanor	54,388	38.3	62,762	36.7	68,486	36.1	67,664	33.0	62,076	30.5	60,948	29.8	65,844	31.3
Felony	60,020	40.0	66,570	38.9	74,836	39.6	86,070	41.5	83,826	41.1	84,988	42.2	88,876	42.2
Lower court dispositions	79,863	63.2	89,881	62.8	97,712	81.6	100,763	48.1	83,980	46.1	82,063	46.8	87,767	46.5
Dismissed	24,263	16.2	28,288	16.6	30,481	16.1	29,680	14.6	28,583	14.0	28,160	14.0	29,627	14.0
Acquitted	671	.4	818	.4	633	.3	482	.2	424	.2	308	.2	208	.1
Convicted	66,818	36.7	62,774	36.7	66,588	36.2	70,622	34.4	64,843	31.8	63,584	31.6	67,932	32.3
Sentence														
Youth Authority	32	.0	36	.0	28	.0	21	.0	3	.0	6	.0	3	.0
Probation	18,311	12.2	20,608	12.0	21,447	11.3	21,740	10.6	18,663	9.2	16,257	8.1	16,361	7.8
Probation with jail	22,799	15.2	26,608	15.5	29,133	16.4	32,417	15.8	33,308	16.3	34,957	17.4	38,114	18.6
Jail	8,756	5.8	10,186	6.0	10,408	5.5	10,860	5.3	8,870	4.8	10,241	5.1	10,228	4.9
Fine	5,023	3.3	5,312	3.1	5,413	2.8	5,367	2.6	2,806	1.4	2,004	1.0	2,042	1.0
Other	88	.1	214	.1	168	.1	227	.1	173	.1	130	.1	164	.1
Superior court dispositions	34,568	23.8	38,341	23.0	43,809	23.0	51,941	26.3	51,940	26.8	52,874	26.3	56,863	27.1
Dismissed	3,758	2.5	3,702	2.2	3,906	2.1	5,018	2.4	4,519	2.2	3,986	2.0	3,858	1.8
Acquitted	808	.6	740	.4	748	.4	822	.4	821	.5	826	.4	770	.4
Convicted	29,806	18.9	34,888	20.4	38,867	20.8	46,000	22.4	46,500	22.8	48,060	23.9	52,336	24.9
Sentence														
Death	1	0	20	.0	24	.0	36	.0	38	.0	34	.0	27	.0
Prison	8,888	4.6	8,838	5.2	10,311	5.4	13,871	6.8	16,122	7.4	16,677	8.3	18,084	8.6
Youth Authority	1,268	.8	1,480	.9	1,663	.8	1,907	.8	1,262	.6	464	.2	331	.2
Probation	4,061	2.7	4,326	2.8	4,424	2.3	4,821	2.3	4,818	2.4	6,017	2.8	5,091	2.4
Probation with jail	15,478	10.3	18,160	10.8	20,743	11.0	23,234	11.3	23,474	11.5	24,540	12.2	27,260	13.0
Jail	1,113	.7	1,148	.7	1,068	.6	1,224	.6	1,162	.6	926	.5	844	.4
Fine	81	.1	80	.1	82	.0	63	.0	36	.0	28	.0	28	.0
California Rehabilitation Center	790	.5	568	.3	352	.2	438	.2	363	.2	367	.2	647	.3
State hospital[a,b]	226	.1	260	.2	266	.2	264	.1	141	.1	–	–	–	–
Other	3	.0	13	.0	13	.0	12	.0	13	.0	16	.0	15	.0

[a] Continues to state hospital as a mentally disordered sex offender.
[b] Section 6300 of the Welfare and Institutions Code for mentally disordered sex offenders was repealed in 1981, effective January 1982.
Note: Percents may not add to 100.0 because of rounding.

DEPARTMENT OF JUSTICE, DIVISION OF LAW ENFORCEMENT
CRIMINAL IDENTIFICATION AND INFORMATION BRANCH
BUREAU OF CRIMINAL STATISTICS AND SPECIAL SERVICES

EXHIBIT A, Page 1

RIVERSIDE COUNTY DISTRICT ATTORNEY
SUPERIOR COURT SENTENCING
1984

	# CASES	# DEFS.	# COUNTS	CONVICTIONS A/C	CONVICTIONS LESSER	D I S M	N/G	1192.7 DA SERIOUS FELONY	DA AGREED PROC. SUSP.
JURY TRIALS	130	135	324	115	5	0	15	69	1
COURT TRIALS	12	14	38	12	0	0	2	7	0
PLEAS/DISMISSALS (SUP. CT.)	525	554	1046	453	81	20	0	142	78
859a PLEAS	981	1006	1727	956	50	0	0	191	291
VIOLATION OF PROBATION	210	220	240	217	1	2	0	18	7
CONVICTION TOTALS	1858	1929	3375	1753	137	22	17	427	377

	PROB.	SENTENCE STATE PRISON # YRS.	STATE PRISON # DEFS.	C.R.C. # YRS.	C.R.C. # DEFS.	OTHER (CYA/CJ)
JURY TRIALS	18	791+ 1 DP + 3 LWOP	97	8	2	3
COURT TRIALS	4	36 + 1 DP	8	0	0	0
PLEAS/DISMISSALS (SUP. CT.)	288	1068 1/3	237	33	11	17
859a PLEAS	581	1268	409	56	20	16
VIOLATION OF PROBATION	110	180 1/3	91	22	9	8
CONVICTION TOTALS	982	3339 2/3	842	119	42	44

CASES	1858
DEFENDANTS	1929
COUNTS	3375
AS CHARGED	1753*
REDUCED	137
DISMISSED	22
NOT GUILTY	17

*Following District Attorney's Serious Felony Disposition Guidelines